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## Russell v. State Appellant's Brief Dckt. 41783

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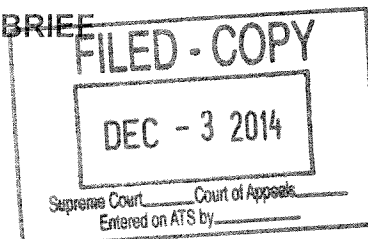
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DONALD BRUCE RUSSELL, )  
 )  
 Petitioner-Appellant, )  
 )  
 v. ) NO. 41783  
 ) KOOTENAI COUNTY  
 ) NO. CV 2012-3931  
 )  
 STATE OF IDAHO, ) APPELLANT'S BRIEF  
 )  
 Respondent. )  
 \_\_\_\_\_ )



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

HONORABLE MICHAEL J. GRIFFIN  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Donald Bruce Russell appeals from the district court's order denying his Petition for Post-Conviction Relief. He asserts that the district court erred in summarily dismissing his post-conviction petition on the issue of whether trial counsel was ineffective for failing to adequately prepare mitigation evidence for the sentencing hearing, because he presented *prima facie* evidence of ineffective assistance of counsel.

### Statement of the Facts and Course of Proceedings

Pursuant to a plea agreement, Mr. Russell pleaded guilty to one count of felony lewd conduct with a minor. (R., p.121.) Under the plea agreement, Mr. Russell waived his right to appeal the sentence. (R., p.122.) The district court imposed a unified sentence of fifteen years, with five years fixed. (R., p.122.)

Mr. Russell subsequently filed, *pro se*, a Petition and Affidavit for Post Conviction Relief.<sup>1</sup> (R., pp.6-10, 15-17.) In his petition for post-conviction relief, Mr. Russell asserted that the district court denied him due process through using erroneous data from a polygraph and a psychosexual report to determine his sentence, that his counsel provided inadequate representation, and that his counsel coerced him into accepting the plea agreement. (R., p.7.) The State then filed an answer to the petition. (R., pp.26-27.)

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<sup>1</sup> Mr. Russell's matter was reassigned to a district judge from the Second Judicial District. (R., pp.28-32.)

The district court granted Mr. Russell's motion for the appointment of counsel. (R., p.35.) Later, Mr. Russell filed an Amended Petition for Post-Conviction Relief. (R., pp.73-78, 85-86.) In the amended petition, Mr. Russell asserted seven claims based on ineffective assistance of counsel, including that counsel failed to adequately prepare mitigation evidence for the sentencing hearing. (R., pp.74-78.) He also filed an affidavit in support of the amended petition. (R., pp.79-84.) The State then filed an answer to the amended petition. (R., pp.87-88.)

The district court issued a Notice of Intent to Dismiss, informing Mr. Russell that the district court planned to dismiss portions of his amended petition. (R., pp.89-90.) The district court intended to reserve for hearing two issues: "First, whether or not counsel reviewed the presentence report and psychosexual evaluation with the petitioner. Secondly, whether or not disclosing the psychosexual evaluation to the state and court was ineffective assistance of counsel." (R., p.89.) The district court also stated that it would "consider at hearing whether either of these two issues, if established, prejudiced the petitioner." (R., p.89.)

The district court intended to dismiss all of the other issues raised in Mr. Russell's amended petition unless he submitted admissible evidence to support those issues within 20 days from the date of the Notice of Intent to Dismiss, "upon the grounds that the petitioner's allegations are bare conclusory statements and not supported by admissible evidence, and do not state grounds upon which relief can be granted." (R., p.90.)

Mr. Russell filed a Memorandum in Response to Notice of Intent to Dismiss, clarifying that the second issue reserved for hearing "shall include the disclosure of the

polygraph examination performed for the purpose of use with the psychosexual evaluation; requested and funded by the Petitioner/Defendant; and voluntarily offered with the psychosexual evaluation by defense counsel.” (R., pp.98-100.) Mr. Russell also stated that he “does not submit additional evidence to support the other issues that the Court has noticed for dismissal, but hereby reserves his right to appeal those issues should the Defendant choose after a final order is entered in this matter.” (R., p.99.)

The district court then issued an Order Dismissing Portions of the Petition for Post-Conviction Relief, dismissing all of the issues raised in the amended petition, other than the two issues reserved for hearing, “upon the grounds that the petitioner’s allegations are bare conclusory statements and not supported by admissible evidence, and do not state grounds upon which relief can be granted.” (R., pp.96-97.)

The district court subsequently conducted an evidentiary hearing on the two reserved issues. (R., pp.112-19.) Later, the district court issued an Opinion RE: Petition for Post-Conviction Relief. (R., pp.121-26.) On the first issue, the district court found that counsel had reviewed the presentence report with Mr. Russell. (R., p.124.) The district court also found that Mr. Russell “had not read the psychosexual evaluation prior to sentencing or specifically consent the evaluation to the court.” (R., p.124.) Mr. Russell’s consent to release the psychosexual evaluation was required, but not given. (R., p.124.)

However, the district court found that Mr. Russell did not prove any prejudice. (R., p.125.) The psychosexual evaluation could have been of concern because the polygraph referred to the possibility that Mr. Russell was being deceptive as to other victims. (R., p.124.) However, the district court did not find that there were other

victims beyond Mr. Russell's daughters (which he admitted). (R., p.124.) The district court determined that Mr. Russell "has not shown that his sentence would have been less but for the psychosexual evaluation." (R., p.125.) "While revealing the psychosexual evaluation to the court and state without Russell's consent is ineffective assistance of counsel, as is not having Russell read the psychosexual evaluation prior to sentencing, no prejudice has been shown. The court did not find that there were other victims other than Russell's admissions that he abused his daughters." (R., p.125.) Thus, the district court denied the amended petition. (R., pp.125, 127-28.)

Mr. Russell filed a Notice of Appeal timely from the district court's Order Denying Petition for Post-Conviction Relief. (R., pp.143-45.)



### ISSUE

Did the district court err when it summarily dismissed Mr. Russell's petition for post-conviction relief on the issue of whether trial counsel was ineffective for failing to adequately prepare mitigation evidence for the sentencing hearing?

## ARGUMENT

### The District Court Erred When It Summarily Dismissed Mr. Russell's Petition For Post-Conviction Relief On The Issue Of Whether Trial Counsel Was Ineffective For Failing To Adequately Prepare Mitigation Evidence For The Sentencing Hearing

#### A. Introduction

Mr. Russell asserts that the district court erred when it summarily dismissed his petition for post-conviction relief on the issue of whether trial counsel was ineffective for failing to adequately prepare mitigation evidence for the sentencing hearing. Mr. Russell asserted that trial counsel failed to prepare to provide mitigating evidence at sentencing by failing to offer facts and supporting proof that would mitigate Mr. Russell's actions or show his commitment to rehabilitation, including "proof of prior appointment for consultation with a psychologist." (R., pp.75-76.) The district court summarily dismissed that issue after determining "that the petitioner's allegations are bare conclusory statements and not supported by admissible evidence, and do not state grounds upon which relief can be granted." (See R., pp.89-90, 96-97.) However, Mr. Russell actually presented *prima facie* evidence of ineffective assistance of counsel regarding that issue. Thus, the district court erred when it summarily dismissed the post-conviction petition on that issue.

#### B. Standard Of Review And Applicable Law

"An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature." *Charboneau v. State*, 144 Idaho 900, 903 (2007). Like any other civil plaintiff, a petitioner for post-conviction relief must prove by a preponderance of the evidence the factual allegations upon which the application for

post-conviction relief is based. *Id.* However, unlike a complaint in a normal civil action, “an application for post-conviction relief must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included.” *Id.* (citing I.C. § 19-4903).

Summary disposition of a petition for post-conviction relief is appropriate if the petitioner’s evidence has not raised a genuine issue of material fact. I.C. § 19-4906(b) & (c). “On review of a dismissal of a post-conviction relief application without an evidentiary hearing,” an appellate court “will determine whether a genuine issue of fact exists based on the pleading, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” *Charboneau*, 144 Idaho at 903. “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Id.* “When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing.” *Id.* “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” *Id.* But if genuine and material factual issues have been raised, an evidentiary hearing must be conducted pursuant to I.C. § 19-4906. *Nellsch v. State*, 122 Idaho 426, 430 (Ct. App. 1992).

Put otherwise, “[a] petition for post-conviction relief will be subject to summary dismissal if the petition has not presented evidence establishing a prima facie case as to each element of the claim upon which the applicant bears the burden of proof.” *Pratt v. State*, 134 Idaho 581, 583 (2000). Thus, a petition for post-conviction relief

based on a claim of ineffective assistance of counsel will “survive a motion for summary dismissal if the petitioner establishes: (1) a material issue of fact exists as to whether counsel’s performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner’s case.” *Id.*

C. Mr. Russell Presented *Prima Facie* Evidence Of Ineffective Assistance Of Counsel, Because He Stated In His Petition And Supporting Affidavit That His Trial Counsel Failed To Offer Mitigating Evidence And That Deficiency Caused The District Court To Impose His Sentence

Mr. Russell asserts that he presented *prima facie* evidence of ineffective assistance of counsel, because he stated in his petition and supporting affidavit that his trial counsel was deficient because counsel failed to offer mitigating evidence, including Mr. Russell’s prior appointment for consultation with a psychologist, and that the deficiency prejudiced him because it caused the district court to impose his sentence.

The right to counsel in criminal actions brought by the State of Idaho is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *Booth v. State*, 151 Idaho 612, 617 (2011). An ineffective assistance of counsel claim may properly be brought under the UPCPA. *Id.* Under the two-part *Strickland* test, “[t]o prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency.” *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKeeth v. State*, 140 Idaho 847, 850 (2004)). To establish a deficiency, the defendant must show that the attorney’s performance fell below an objective standard of reasonableness. *McKay v. State*, 148 Idaho 567, 571 (2010). To

establish prejudice, the defendant must show a reasonable probability that the outcome of the trial would have been different but for the attorney's deficient performance. *Id.*

Here, Mr. Russell presented *prima facie* evidence of ineffective assistance of counsel. He stated in his petition and supporting affidavit that his trial counsel was deficient because counsel failed to offer mitigating evidence, including Mr. Russell's prior appointment for consultation with a psychologist. In the petition, Mr. Russell asserted that trial counsel failed to offer mitigating evidence "including but not limited to, providing proof of prior appointment for consultation with a psychologist for assistance with similar concerns." (R., p.76.) In the supporting affidavit, he averred that he "asked my attorney to bring up specific issues regarding the timing of doctor's appointments I had scheduled in aid of mitigation at sentencing and he failed to do so," and that he "asked that [trial counsel] obtain proof of the previously scheduled doctor appointments as proof of my commitment to seek help toward rehabilitation and he refused." (R., p.83.) Thus, trial counsel's failure to offer mitigating evidence constituted deficient performance.

Mr. Russell also stated that trial counsel's deficiency prejudiced him because it caused the district court to impose his sentence. The district court imposed a unified sentence of fifteen years, with five years fixed. (R., p.122.) In the petition, Mr. Russell asserted that all of trial counsel's deficiencies, including the failure to offer mitigating evidence, "acted both separately and in concern with one another and separately to cause the Court to impose the resulting prison sentence." (R., p.85.) Thus, trial counsel's deficiency prejudiced Mr. Russell.

In sum, Mr. Russell presented *prima facie* evidence of ineffective assistance of counsel. His petition and supporting affidavit established that material issues of fact exist as to whether his trial counsel's performance was deficient and as to whether the deficiency prejudiced his case. See *Pratt*, 134 Idaho at 583. Thus, the claim that Mr. Russell's trial counsel was ineffective for failing to present mitigating evidence should have survived summary dismissal. See *id.*

The district court erred when it summarily dismissed Mr. Russell's petition for post-conviction relief on the issue of whether trial counsel was ineffective for failing to adequately prepare mitigation evidence for the sentencing hearing. The summary dismissal of that issue should be vacated, and the case remanded for an evidentiary hearing on that issue.

#### CONCLUSION

For the above reasons, Mr. Russell respectfully requests that this Court vacate the summary dismissal of his post-conviction petition with respect to the issue of whether trial counsel was ineffective for failing to adequately prepare mitigation evidence for the sentencing hearing, and remand the case to the district court for an evidentiary hearing on that issue.

DATED this 3<sup>rd</sup> day of December, 2014.

  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of December, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

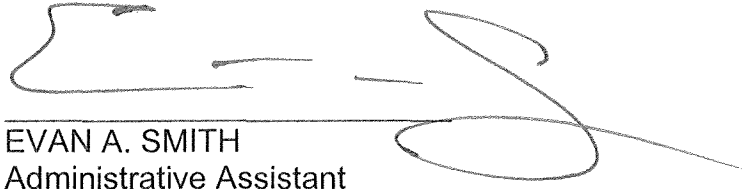
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